Supreme Court, U.S.
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No. 00-____

IN THE

Supreme Court of the United States

DONALD E. DAWSON,
Petitioner,

v.

JAMES GOMEZ, DIRECTOR, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a violation of the Fourteenth Amendment's Due Process Clause is established where the State secures a criminal conviction through the knowing use of false evidence, or whether such a violation may only be shown through proof that the evidence was perjured.

2. Whether the Court of Appeals below erred by concluding that petitioner received effective assistance of counsel under the Sixth Amendment.

PARTIES

The petitioner in this case is Donald Emil Dawson, a person in state custody.

The respondents in this case are C. A. Terhune, Director of the California Department of Corrections, and Bill Lockyer, the Attorney General of the State of California. At the time petitioner filed his petition under 28 U.S.C. §2254 in federal court, James Gomez was the Director of the California Department of Corrections.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald Dawson respectfully requests that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in *Dawson v. Gomez*, No. 96-56724.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished and is reprinted in the appendix to this petition at App. 1a. The order of the U.S. District Court, Central District of California, adopting the Report and Recommendation of the Magistrate Judge, is reprinted along

with the Report and Recommendation in the appendix herein at App. 4a.

The opinions of the California Supreme Court denying Dawson's three state habeas petitions are reprinted at App 31a.

The oral opinion of the Orange County Superior Court on petitioner's motion for a new trial is reprinted herein at App. 35a.

JURISDICTION

The opinion of the Ninth Circuit was issued on June 22, 2000. A timely petition for rehearing was denied on August 11, 2000. App. 41a. This petition is being timely filed within 90 days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Petitioner raised the claims below to the California Supreme Court, and has therefore exhausted his state remedies.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

2. The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

A. Introduction

In a long line of cases beginning with *Mooney v. Holohan,* 294 U.S. 103 (1935), this Court developed the principle that a State may not obtain a criminal conviction through the knowing use of false testimony. The kernel of these cases is that due process is offended where the State has deliberately deceived the jury so as to pervert "the truth-seeking function of the trial process." *United States v. Agurs,* 427 U.S. 97, 104 (1976).

In this federal habeas case,[1] the Ninth Circuit required petitioner to show that testimony of the State's key witness against him was not just false, but "perjured." The Ninth Circuit's decision reflects a larger uncertainty in the federal circuits about whether perjured or false testimony is the threshold standard in this area of law. Unlike false testimony, perjury requires an intentional, literal falsehood and thus represents a higher burden of proof. From a due process standpoint, however, it makes little difference whether the witness herself harbored the intent to deceive, or whether her testimony was simply false or substantially misleading. Rather, the issue that has consistently concerned this Court is whether the *State* knowingly exploited the testimony to distort the adversarial testing process. This concern is especially acute where, as here, there is only one issue for trial, and truthful testimony from the witness would have substantially corroborated the defense.

In addition, the Ninth Circuit erroneously concluded that petitioner had received effective assistance of counsel where

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[1] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 ("AEDPA"), is not applicable to this case because petitioner's habeas petition was filed before the ADEPA became effective.

counsel failed to cross examine the key witness regarding her false testimony and failed to take prompt measures to document the petitioner's mental condition at the time of the crime.

B. Factual Background

Petitioner Donald Dawson ("Dawson") is serving a sentence of 25 years to life for the shooting death of his ex-wife Dona Dawson ("Dona").

Dawson and Dona were divorced in 1982 but continued to date each other in an emotionally charged "on-again, off-again" relationship. At the time of her death, Dona had been dating another man, Robert Baker, for several months. (RT 222-25). Dawson was shattered when Dona told him she was in love with Baker. (*See* RT 213). He hoped to get back together with Dona. (*See* RT 214-15).

The night before Dona was killed, Dawson reported he was consumed by a "jealous rage" after seeing Dona together with Baker at a local restaurant. (RT 704). Dawson left desperate messages on Dona's answering machine, pleading over twenty times that he wanted to talk with her. (RT 211-16). Early in the morning on September 15, 1984, Dawson drove to Dona's house carrying two guns, handcuffs, rope, and a flashlight, and let himself in. (RT 93-98).

Dona spent the evening with Baker and did not arrive home until approximately 9:00 a.m. (RT 225-26). Shortly after she entered the house, she and Dawson had a heated exchange regarding whether she had had sexual intercourse with Baker the night before. (RT 1302, 1313, 1333). Dawson began shooting, and Dona ran out of the house. Dona was struck with a bullet and fell to the ground but Dawson continued to fire his gun. (RT 34-37). A neighbor, Judy Kearns, was the only witness to events just before and after the shooting.

Dawson never denied killing his ex-wife. The sole issue at trial was therefore his mental state at the time of the crime. Critical to that issue was the undeniable evidence of an argument just seconds before the shooting, which tended to show that Dawson pulled the trigger "upon a sudden quarrel or heat of passion" so as to be guilty only of voluntary manslaughter. *See* Cal. Penal Code §192. This evidence was as follows:

1. At the scene of the crime, a police officer interviewed Judy Kearns, Dona's neighbor, who stated that before hearing the first gunshot, she heard "a female scream and a mumbling of voices of a man and woman."[2]

2. At a preliminary hearing less than three months after the incident, Kearns unequivocally testified under oath to an "angry conversation" preceding the first shot:

> Q: You had indicated that you heard a female scream, and I believe you indicated you heard the mumbling of the voices of a man and a woman?
>
> A: Yes, it sounded like an angry conversation.
>
> * * *
>
> Q: So, there is angry conversation which you thought at that time was between a male and female?
>
> A: Uh-huh?
>
> Q: And that went on for some time, and then you heard a female scream?

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[2] An excerpt of the police report is attached to Dawson's *pro se* pleadings in the district court. *See* Exhibit E, Petitioner's Second Traverse to Respondents' Second Supplemental Answer to Petition for Writ of Habeas Corpus, Filed Nov. 29, 1995.

A: It was just barely and then I heard the one shot. . . .

Q: So, you heard a few seconds of angry conversation, would that be correct?

A: Uh-huh.

Q: Then you heard a female scream?

A: Uh-huh.

Q: Then you heard a gunshot?

A: Uh-huh.

(CT 31-32).

3. At their first meeting on the night of the shooting, Dawson told his attorney that he and Dona had had an argument; "that there was an exchange that was heated; that there was some reference . . . by one of the parties . . . with respect to that she had been out all night, or where was she going, or where had she been, that kind of exchange; that she screamed at him or yelled at him to get out; questioned him heatedly about what was he doing there . . . ." (RT 1517-18).

4. At the hearing on Dawson's motion for a new trial, Dawson himself testified under oath that he and Dona got into an argument about whether Dona had had sexual intercourse with Baker the night before. (RT 1302, 1313, 1333). The argument became "the stick of dynamite that set everything off. . . ." (RT 1333).

Apart from Dawson, Judy Kearns was the only witness to an altercation immediately prior to the first shot. At Dawson's trial more than *two years* later, however, Kearns

changed her story and testified that she did not hear anything prior to the shooting. (RT 38-39).

The prosecutor knew about Kearns' sworn testimony at the preliminary hearing and the statement she gave at the scene of the crime. He even represented them as true in a signed pleading to the state trial court. (CT 138, 147). Nonetheless, he made no effort to correct the false impression left by Kearns' testimony at trial. He did not seek a bench conference with the judge or attempt to confer with Dawson's counsel. *See United States v. LaPage,* No. 00-50015, 2000 WL 1638956, at *2, __ F.3d __ (9th Cir. Nov. 2, 2000). Instead, he capitalized on the falsehood, using it in closing argument to claim that no argument had taken place. (*See* RT 979).

The prosecutor also used Kearns' testimony to attack Dawson's psychiatric experts. The experts were the bulwark of Dawson's claim that he did not form the mental state for first degree murder because of intoxication, "mental defect, or mental disorder."[3] *See* Cal. Penal Code §§ 22(b), 28(a). Dawson had told each of them about his inflammatory altercation with Dona, and the experts testified that they relied in part on this information to reach their conclusions about Dawson's deteriorated mental state. (RT 676, 680, 685-87, 690, 734-35, 783, 786, 789, 805, 828, 853-54, 863-64).

The prosecutor emphasized over and over again that Dawson's statements to his psychiatrists were not admissible for their truth. (RT 926; *cf.* 937-39, 941, 972, 974). He attacked the experts' credibility by suggesting that their opinions were based on erroneous facts about a pre-shooting ar-

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[3] Known in California as "diminished actuality," this defense is legally distinct from a "heat of passion" defense in that it requires proof of mental illness, not of provocation. *See People v. Spurlin,* 156 Cal. App. 3d 119, 125 (1984) ("diminished actuality" cannot constitute "provocation" for statutory voluntary manslaughter).

gument—facts that were not borne out by Kearns' testimony. (RT 803-06, 867-68). In closing, he argued that Dawson started firing immediately as he came down the stairs. (RT 979).

Perhaps even more alarming than the prosecutor's conduct was that of Dawson's own counsel, Ronald Brower. When the State completed Kearns' direct examination without any mention of the altercation between Dawson and Dona, Brower did not cross-examine Kearns *at all.* He did not attempt to impeach her with her prior sworn statements. He did not attempt to introduce those statements as substantive evidence of a "sudden quarrel."[4] He did not attempt to have Dawson testify for the limited purpose of establishing a pre-shooting argument.

In addition, Brower failed to arrange for Dawson to be examined by a mental health expert until more than 13 months after the shooting, even though he rested Dawson's entire defense on the fact that Dawson suffered from intoxication or other *temporary* mental defect or illness. Although six experts ultimately testified at Dawson's trial, the delay opened door and gate to a devastating impeachment by the prosecutor.

C. District Court Decision

The district court found no due process violation based on prosecutorial misconduct because it concluded that Dawson "presented no evidence to show that [Judy Kearns'] testimony was actually false." App. 25a.

The court also found that counsel's delay in arranging a mental examination and his failure to impeach Judy Kearns

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[4] Under California rules of evidence, both Kearns' preliminary hearing testimony and her statements to the police officer were admissible not just for impeachment, but also for their truth. *See* Cal. Evid. Code §1235; *People v. Zapien,* 4 Cal.4th 929, 952-53 (1993).

were not deficient. App. 19a-20a. As to these allegations of deficient conduct, the court did not reach the prejudice prong of *Strickland v. Washington,* 466 U.S. 668 (1984).

D. Court of Appeals Decision

The Ninth Circuit held that, "[i]nsofar as Dawson has not demonstrated that Kearns's testimony was *perjured,* he cannot succeed on a claim that the prosecutor knowingly used perjured testimony by putting her on the stand." App. 3a (emphasis added).

With regard to petitioner's Sixth Amendment claims, the court held that Brower's "strategic" decisions not to impeach Kearns and to delay a psychiatric examination were "presumed proper" under *Strickland,* 446 U.S. at 690. App. 2a. Even if they were not strategic, "they were not prejudicial in light of the overwhelming evidence against Dawson." App. 2a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY A CONFUSION IN THE FEDERAL CIRCUITS OVER THE CONTINUED VALIDITY OF THE *MOONEY* LINE OF CASES

A. This Court Has Indicated A Departure From The Rule Of *Mooney* And Its Progeny Without Overruling Those Cases Or Otherwise Explaining The Reason For The Departure

The first question presented is whether the Court's "false testimony" line of cases, beginning with *Mooney v. Holohan,* 294 U.S. 103 (1932), is still good law. *Mooney* and its progeny stand for the proposition that a criminal conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the due process clause of the Fourteenth Amendment.

The Court elaborated on this standard in a series of unanimous opinions beginning with *Alcorta v. Texas*, 355 U.S. 28 (1957). In *Alcorta*, the Court reversed a first degree murder conviction because it found that the State had used testimony that gave the jury a "false impression" about a material fact. *Id.* at 31. In *Napue v. Illinois*, 360 U.S. 264 (1959), the Court held that a murder conviction could not stand where the State, "although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 269.

Eight years later, in *Miller v. Pate*, 386 U.S. 1 (1967), the Court reiterated the "false testimony" standard as follows: "the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." *Id.* at 7. Next, in *Giglio v. United States*, 405 U.S. 150 (1972), the Court clarified that the trial prosecutor's subjective knowledge of falsity was irrelevant; it was enough that another prosecutor from the same office knew that material false testimony had been offered at trial. *Id.* at 765-66. Finally, in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), the Court (6-3) reaffirmed its "long series of decisions" holding that the State may not knowingly use false testimony against an accused, but found no due process violation in part because the prosecutor did not introduce "specific misleading evidence important to the prosecution's case in chief." *Id.* at 647.

In none of these cases did the Court require the defendant to show that the State had knowingly introduced *perjured* testimony.[5] Rather, it was sufficient that the State had—either actively or passively—participated in creating a false impression of material fact on the jury.

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[5] Although *Mooney* and *Pyle v. Kansas*, 317 U.S. 213 (1942), spoke in terms of "perjured" testimony, in each case the petition itself had specifically alleged the State's use of perjured evidence.

In *Alcorta,* for instance, the petitioner was convicted of first degree murder but claimed he had killed his wife in the heat of passion after discovering her kissing one Natividad Castilleja. At trial, it was Castilleja's word against the petitioner's. Castilleja testified that (1) he was not in love with the petitioner's wife; (2) the wife was not in love with him; and (3) neither had talked about love. *Id.* at 30. He subsequently confessed to having had sex with the petitioner's wife. The Court found a due process violation because Castilleja's testimony created "the false impression that [his] relationship with petitioner's wife was nothing more than . . . a casual friendship"—not because it amounted to perjury or was even literally false. *See id.* at 31. Even if they had enjoyed sexual relations, it is entirely possible that neither Castilleja nor the petitioner's wife was in love with the other or had spoken about love. Instead, what troubled the Court was that the prosecutor knowingly misled the jury about a crucial fact in order to obtain a conviction.

Similarly, in *Giglio,* an Assistant U.S. Attorney elicited the following testimony from Robert Taliento, the only witness who could link petitioner Giglio to the crime:

> Q: Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?
>
> A: Nobody told me I wouldn't be prosecuted.
>
> Q: They told you you might not be prosecuted?
>
> A: I believe I still could be prosecuted.

After Giglio was convicted, the following evidence came to light: DiPaola, a different Assistant from the same office, filed an affidavit stating that he had promised Taliento that no charges would be pressed if Taliento would testify before the Grand Jury. Golden, the Assistant who tried the case, filed an affidavit stating that DiPaola had assured him prior

to trial that no promises of immunity had been made. Finally, Hoey, the U.S. Attorney, filed an affidavit stating that he consulted with Taliento and his attorney shortly before trial to emphasize that even if Taliento testified, he would have to rely on the "good judgment and conscience of the Government" as to whether he would be prosecuted. *Id.* at 152-53.

There was at best contradictory evidence as to whether Taliento actually believed he would not be prosecuted. In finding a due process violation, however, the Court did not consider whether Taliento had perjured himself. Nor could it have found that Assistant Golden, who knew nothing of any promises, had committed perjury or subornation of perjury. It was sufficient that Taliento's testimony was false or created a false impression about a material fact that went to his credibility.

In 1976, the *Mooney* line of precedent was modified when the Court decided *United States v. Agurs*, 427 U.S. 97 (1976). *Agurs* was not a "false testimony" case: there was no claim, as in *Mooney* and its progeny, that the State had knowingly presented testimony that was false or misleading. *See id.* at 104. Rather, *Agurs* raised the question of whether due process required the State voluntarily to disclose a murder victim's criminal record, even where that record had not been requested by the defense.

Nonetheless, the *Agurs* Court undertook to summarize the *Mooney* line of cases and, in so doing, characterized the "false testimony" standard as one of "perjured testimony." Without any explanation, the Court cited *Alcorta, Napue, Miller, Giglio,* and *Donnelly* for the proposition that "a conviction obtained by the knowing use of *perjured* testimony is fundamentally unfair." *Id.* at 103 & n.8 (emphasis added).

This change is subtle but far from trivial. It is well-settled that perjury requires proof of conscious deception, not

just a false statement made by dint of confusion, mistake or forgetfulness. *See, e.g.*, 18 U.S.C. §1621; Cal. Penal Code §118(a); *People v. Von Tiedeman*, 120 Cal. 128, 135-36 (1898) (citing *Wharton's Criminal Law*). Moreover, as long as testimony is literally true, it does not constitute perjury even if it implies something false or is intended to leave a false impression. *See, e.g., Bronston v. United States*, 409 U.S. 352, 359-61 (1973). *Agurs* is therefore at odds with the Court's earlier pronouncements on the subject.

As a result, a question is raised as to the continuing validity of this Court's "false testimony" precedent. On the one hand, *Mooney* and its progeny have not been overruled and continue to be cited by lower federal courts. On the other hand, this Court has referred to *Agurs* as the definitive statement of the prevailing legal standard. *See, e.g., Albright v. Oliver*, 510 U.S. 266, 299 (1994) ("Our cases make clear that . . . the Due Process Clause is violated by the knowing use of perjured testimony. . . ."); *United States v. Bagley*, 473 U.S. 667 (1985) (*Agurs* "noted the well-established rule that 'a conviction obtained by the knowing use of perjured testimony is fundamentally unfair. . . .'"). The Court should grant review to resolve this question.

B. Confusion Prevails In The Federal Circuits Regarding The Continuing Validity Of The *Mooney* Standard

The Court's substitution of a stricter "perjury" standard, without repudiating cases such as *Alcorta, Napue*, and *Giglio*, has caused considerable confusion in the federal circuit courts. Although no clear conflict emerges along circuit lines, there is substantial variation in the standard that is applied both within and across the circuits. As a result, defendants do not always know the exact standard that will be applied in their case.

The First, Sixth, Seventh, and Eighth Circuits show a preference for this Court's post-*Agurs* jurisprudence by requiring a defendant to prove that the State knowingly used testimony that rises to the level of perjury. The Fifth, Tenth, and Eleventh Circuits appear to follow the less rigorous standard of the pre-*Agurs* cases, requiring a showing only of false testimony or testimony that conveys a false impression. The Second, Third, Fourth, Ninth, and District of Columbia Circuits show no special allegiance to either standard, leaving it virtually to chance which one will be applied on appeal. Within every circuit, moreover, courts are prone to employ "false testimony" and "perjured testimony" as if they were interchangeable, creating further uncertainty about the proper standard of proof. Below is a circuit-by-circuit analysis.

First Circuit: The majority of First Circuit cases articulate the standard in terms of "perjury." *See, e.g., United States v. Tavares,* 93 F.3d 10, 14 (1st Cir. 1996) (perjury occurs when a witness gives false testimony willfully, as opposed to because of confusion, mistake, or faulty memory). But at least one recent case has acknowledged that "false or misleading" testimony will suffice. *See United States v. Escobar-de-Jesus,* 187 F.3d 148, 167 (1st Cir. 1999).

Second Circuit: The Second Circuit shows no particular leaning toward either the *Agurs* or pre-*Agurs* standard. *See, e.g., United States v. Helmsley,* 985 F.2d 1202, 1205-06 (2d Cir. 1993) ("a defendant must establish that there was false testimony"); *Mills v. Scully,* 826 F.2d 1192, 1195 (2d Cir. 1987) (same); *United States v. Zichettello,* 208 F.3d 72, 102 (2d Cir. 2000) (defendant must establish that witness "actually committed perjury").

Third Circuit: There are very few Third Circuit cases from which to draw any sound conclusions. *See United States v. McCrane,* 575 F.2d 58, 61 (3d Cir. 1978) (in *dic-*

tum, repeating the *Agurs* "perjured testimony" standard); *United States v. Harris*, 498 F.2d 1164, 1168 (3d Cir. 1974) (prosecutor has duty to apprise the court where testimony is "substantially misleading" regardless of whether witness "inten[ded] to lie").

Fourth Circuit: The standard in the Fourth Circuit is unclear. *Compare United States v. Ellis*, 121 F.3d 908, 927 (4th Cir. 1997) (defendant failed to establish due process violation because evidence at most showed that witness "was mistaken, not that she lied.") *with Boone v. Paderick*, 541 F.2d 447, 450 (4th Cir. 1976) (testimony that "skirts the edge of perjury" was nonetheless "false" for purposes of proving due process violation).

Fifth Circuit: Most Fifth Circuit cases articulate the standard in terms of "false testimony." *See United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir. 1993). This has been interpreted to include testimony that casts a "false impression." *See United States v. Barham*, 595 F.2d 231, 240, 241, 243 & n.17 (5th Cir. 1979) (finding due process violation where witness' testimony, while perhaps "truthful in a narrow, literal sense" and not "false or deceitful," was "misleading," "not completely candid," and created a "false impression.").

Sixth Circuit: *Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir. 2000) (testimony must be "indisputably false," not merely misleading or create a false impression); *United States v. Lochmondy*, 890 F.2d 817, 823 (6th Cir. 1989) (same).

Seventh Circuit: Seventh Circuit cases consistently hold that nothing less than actual perjury will suffice. *See, e.g., United States v. Payne*, 102 F.3d 289, 292 (7th Cir. 1996) (perjury is "'the willful assertion under oath of a false, material fact'"); *United States v. Verser*, 916 F.2d 1268, 1271

(7th Cir. 1990) (requiring "'willful assertion under oath of a false, material fact'" under 18 U.S.C. §1621).

Eighth Circuit: Perjury is the favored standard in the Eighth Circuit. *See, e.g., United States v. Albanese,* 195 F.3d 389, 393 (1999) (finding the witness had not "committed perjury" because he "would lack the requisite *mens rea* for perjury"). However, one post-*Agurs* case cited *Giglio* and *Napue* for the proposition that prosecutorial misconduct is not "narrowly and technically limited to those situations where the prosecutor knows that the witness is guilty of the crime of perjury," and that the prosecution has a constitutional obligation to alert the court when he knows the witness' testimony is "substantially misleading." *See United States v. McClintic,* 570 F.2d 685, 692 n.13 (8th Cir. 1978).

Ninth Circuit: There is no special allegiance to either standard in the Ninth Circuit. Some courts insist on a perjury standard. *See United States v. Polizzi,* 801 F.2d 1543, 1550 (9th Cir. 1986) (perjury not proven where testimony was "[a]t best . . . ambiguous" and not literally false). Others adhere to the "false testimony" standard and hold that the creation of a false impression is sufficient. *See United States v. LaPage,* No. 00-50015, 2000 WL 1638956, __ F.3d __ (9th Cir. Nov. 2, 2000) (due process violation where prosecutor failed to correct the "false impression of the facts left with the jury"); *United States v. Ramirez,* 608 F.2d 1261, 1266 n.9 (9th Cir. 1979) (prosecutor has duty to apprise court where witness gives "misleading testimony" regarding government promises).

Tenth Circuit: *Van Woudenberg v. Gibson,* 211 F.3d 560, 569 (10th Cir. 2000) (citing *Mooney* for the proposition that "petitioner bears the burden of proving the prosecutor knowingly presented false testimony"); *United States v. Wolny,* 133 F.3d 758, 762 (10th Cir. 1998) (defendant must show testimony was false);

Eleventh Circuit: In the Eleventh Circuit, the standard has commonly been articulated in terms of "false testimony," *see, e.g., Routly v. Singletary,* 33 F.3d 1279, 1286 (11th Cir. 1994), although there appears to be some ambiguity. *See, e.g., United States v. Gibbs,* 662 F.2d 728, 730 (11th Cir. 1981) ("knowing prosecutorial use of false evidence or perjured testimony violates due process"). At least one recent case described the threshold showing in terms of clear perjury. *See United States v. Bailey,* 123 F.3d 1381, 1395 (11th Cir. 1997) (defendant failed to show due process violation because witness' testimony constituted "nothing more than a memory lapse, unintentional error, or oversight . . . " and was thus not "perjured.")

D.C. Circuit: The D.C. Circuit appears to follow the perjury standard, although the cases are too few to warrant a firm conclusion. *See United States v. Iverson,* 637 F.2d 799, 801 (D.C. Cir. 1980) ("perjured testimony"); *see also United States v. Edmonds,* 870 F. Supp. 1140, 1146 (D.D.C. 1994) (no due process violation where evidence did not show witness "committed perjury by testifying falsely with the requisite willful intent"; perjury not shown through "confusion, mistake or faulty memory").

C. This Case Demonstrates That The Confusion In the Circuits Over The Validity Of The *Mooney* Line Has Significant Consequences

The Ninth Circuit panel required petitioner to prove that Kearns' testimony was "perjured." App. 3a. On this standard, petitioner received due process of law so long as Kearns did not purposefully lie, or as long as her testimony was literally true. The Court should clarify that perjury is not, and has never been, the threshold showing.

First, as explained above, the perjury standard is inconsistent with this Court's unanimous, unrepudiated opinions

in *Alcorta, Napue, Miller,* and *Giglio.* These cases required only proof of "false testimony."

Second, the crux of this constitutional inquiry is not the culpability of the witness; rather, it is the misconduct of the state actor in allowing the false testimony to pervert the "truth-seeking function of the trial process." *Agurs,* 427 U.S. at 104. From that standpoint, it makes little difference whether Kearns intentionally lied or whether, testifying more than two years after the event, she was confused or simply forgot. Either way, the constitutional violation consists in the State's knowing use of her false testimony, which went to a critical fact for the defense, to secure a conviction.

Third, the "perjury" standard effectively insulates prosecutorial misconduct from meaningful judicial review. It permits the State to secure criminal convictions though use of testimony that, even though calculated to mislead, was not literally false. *See Bronston,* 409 U.S. at 359-61. As a result, the type of injustice that so concerned the Court in *Alcorta, Napue,* and *Giglio,* would go largely uncorrected.

Moreover, as a practical matter, it is virtually impossible for Dawson to prove that Kearns willfully falsified her testimony unless she recants or the prosecutor concedes his misconduct.[6] Dawson's success under the perjury standard thus becomes contingent on the offending parties' willingness to come forward and expose themselves to criminal liability.[7] This is especially unlikely where the conduct complained of was not the result of an innocent error but of a calculated effort to deceive.

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[6] This is even more so in a case such as this, where the witness was the sole observer of exculpatory facts.

[7] Perjury is a felony offense in most states. *See, e.g.,* Cal. Penal Code § 118.

The district court below concluded, however, that Kearns' testimony was not even "actually false." This finding, reached without an evidentiary hearing or reliance on state court findings,[8] was clearly erroneous. Recently, the Ninth Circuit reversed a conviction on due process grounds where, as here, the State's key witness gave contradictory sworn testimony. *See United States v. LaPage,* No. 00-50015, 2000 WL 1638956, __ F.3d __ (9th Cir. Nov. 2, 2000). At an earlier trial, the witness answered "no" to the question of whether he recognized a certain individual who had just entered the courtroom. *Id.* at *2. At a subsequent trial, he stated that he had been able to recognize the individual at the earlier proceeding. *Id.* The Ninth Circuit found that the witness' subsequent testimony was false and reversed the petitioner's conviction on due process grounds.

Here, Kearns testified under oath at a preliminary hearing closer to the date of the crime that she heard an "angry conversation" prior to the sound of the first gunshot. Insofar as her subsequent statements at trial contradicted this testimony, they were false under *LaPage.* The weight of evidence supports this conclusion: At the scene of the crime, Kearns told a police officer that she had heard a female scream and a "mumbling of voices" "followed by" a gunshot. The same day that Dona was killed, Dawson privately told Brower that he and Dona had a heated exchange regarding whether Dona had had sexual intercourse with Baker the night before. (RT 1517-18). At the motion for a new trial, Dawson recounted the details of that argument. (RT 1302, 1313, 1333). The district court failed to consider the falsity of Kearns' testimony in light of the totality of this evidence. *See* App. 19a-20a, 25a.

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[8] Dawson first raised this claim in his third habeas petition to the California Supreme Court, which was summarily denied without comment. *See* App. 34a.

As a result of Kearns' change in testimony, the jury heard no evidence of a "sudden quarrel or heat of passion" to support a verdict of voluntary manslaughter. Although the psychiatric experts testified that they relied on Dawson's account of a pre-shooting altercation in forming their opinions about his mental state, the jury heard no evidence to substantiate those opinions and was instructed that it could reject opinions that were not based on sound reasons. (RT 993). *See Kastner v. Los Angeles,* 63 Fal.2d 52, 58 (1965) (jury may reject even an uncontradicted opinion, if the reasons therefore are unsound). In a case where the defendant's mental state was the only issue for trial, there is a "reasonable likelihood" that Kearns' false at trial testimony "could . . . have affected the judgment of the jury." *Napue,* 360 U.S. at 271; *accord Agurs,* 427 U.S. at 103.

II. THE NINTH CIRCUIT ERRED BY CONCLUDING THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

A. Given The Importance Of Kearns' Original Testimony, It Was Objectively Unreasonable For Brower To Forego Cross-Examining Her At Trial

Brower failed to cross-examine Kearns *at all,* thereby withholding from the jury evidence tending to show that Dawson had killed Dona "upon a sudden quarrel or heat of passion." Because Dawson did not testify (at Brower's recommendation), Kearns was the only witness who could confirm the pre-shooting altercation. Her testimony was crucial.

Where, as here, the sole issue for trial was Dawson's mental state, Brower's failure to cross-examine the State's key witness with her prior inconsistent statements constituted deficient performance. *See Nixon v. Newsome,* 888 F.2d 112 (11th Cir. 1989) (key witness testified at another trial that

defendant did not shoot victim but changed her story at defendant's trial; counsel held ineffective for failing to impeach witness); *see also Steinkuehler v. Meschner,* 176 F.3d 441 (8th Cir. 1999); *United States v. Tucker,* 716 F.2d 576, 585, 593 (9th Cir. 1983).

Brower concedes he was "taken back" by Kearns' change in testimony. (RT 1566). Instead of seizing the opportunity to cross-examine Kearns while she was still on the witness stand, however, he excused her subject to recall because he was afraid of charting "an area unexplored or unknown to [him] in front of the jury." (RT 1566).

Brower's failure to cross-examine Kearns on the spot fell below the conduct of a reasonable defense attorney. In *Nixon,* 888 F.2d 112, the Eighth Circuit found ineffective assistance where defense counsel failed to impeach the State's only eyewitness with contradictory statements she had previously made at the trial of another defendant, Anthony Zolun. At Zolun's trial, the witness testified that she never saw Nixon holding a gun; however, at Nixon's trial she was adamant that Nixon had pulled the trigger. The court held that counsel's failure then and there to impeach the State's only eye-witness with her prior contradictory statements constituted deficient performance because it indicated that counsel did not have the transcript of the previous trial at hand or was unfamiliar with its contents. *Id.* at 116.

This case is indistinguishable from *Nixon.* Kearns had testified under oath to an argument that preceded the shooting, and Brower had this well-documented testimony at his disposal. Under California rules of evidence, these statements could have been introduced not just to impeach Kearns but also as substantive proof of the argument. *See* Cal. Evid. Code §1235. To accept Brower's excuse is to hold that any time the State's key witness changes her testimony at trial to the defendant's detriment, counsel is per-

fectly effective when he retreats from that testimony in order to "explore" the matter with the witness out of court. This completely eviscerates the very purpose of cross-examination as a tool for testing a reluctant witness under oath and before the jury. "Without confrontation and cross-examination, a man accused of a crime is at the mercy . . . . of perjured testimony." *Brown v. State,* 110 Nev. 846, 850 (1994).

Brower has articulated no tactical reason for his failure to cross-examine Kearns.[9] Because Kearns was the only witness who could have testified to facts bearing on the crux of the defense, Brower's performance was deficient.

B. Brower's Failure To Have Dawson Examined By Mental Health Experts Until More Than Thirteen Months After The Arrest Was Objectively Unreasonable

On the night of the arrest, Brower told Dawson's relatives that "it was of the utmost importance to retain mental health experts *immediately*." App. 9a (emphasis added). He repeatedly requested money from the relatives toward a mental defense (RT 1227-33, 1572-76) and received $8000 (RT 1193-95, 1494-95). As it turns out, however, Brower spent none of those funds on hiring a psychiatric expert. (RT 1581).

Brower did not arrange for Dawson to be examined by an expert until upwards of 13 months after the shooting. In the case of two experts, the delay was more than two years.[10]

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[9] He did, however, explain why he subsequently decided against recalling her to the stand. (RT 1567).

[10] Dr. Francis Crinella, the "star" expert witness, first saw Dawson 17 months after the shooting. (RT 702-03). Dr. Michael Coburn first saw Dawson after 20 months. (RT 801). Two further experts did not meet

(RT 1581). Although Brower ultimately presented six expert psychiatric witnesses at trial, the conspicuous delay enabled the prosecution to argue that Dawson had used the extra time to study the law and evidence (RT 714, 702-03, 736, 756-57, 796-98, 801-02), and exposed Brower's parade of experts to devastating cross-examination. As the prosecutor repeatedly pointed out:

> Q: Then you don't necessarily think it's patently absurd for an expert to indicate that he can determine what somebody was thinking 18 months ago; do you?

(RT 756)

In a case where the defendant's state of mind at the time of the shooting was the sole issue in dispute, the failure to obtain a prompt mental evaluation is tantamount to a total failure to investigate the defendant's mental state. *See United States v. Gray,* 878 F.2d 702, 711 (3d Cir. 1989) ("Ineffectiveness is generally clear in the context of complete failure to investigate. . . ."); *Nealy v. Cabana,* 764 F.2d 1173, 1177 (5th Cir.1985) ("[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts . . . ."). The crux of Dawson's claim was that his mental acuity was *temporarily* compromised, not that he suffered from a permanent mental defect. Arranging a medical examination to document a condition far after that condition has elapsed is not simply a delayed investigation; it is no investigation at all. As numerous defense experts testified, in these circumstances a prompt psychiatric evaluation was imperative. (RT 1371-72, 1434, 1457).

Dawson until the trial had already begun two years later. (RT 829-30, 865-66).

The State argues that the delay was an informed trial tactic. Shortly after the shooting, Brower had a conversation with Dawson in which Dawson allegedly confessed that he went to Dona's house intending to kill her. Based on this conversation, Brower believed that any mental expert would have concluded that Dawson was not suffering from a mental impairment (RT 1523-24), and feared that the prosecutor would use such negative reports against Dawson at trial. Brower therefore waited for Dawson to "become more defense minded" (RT 1528-30) before he arranged a psychiatric evaluation. This explanation is objectively unreasonable.

First, as Brower himself admitted (RT 1590), any psychiatric reports generated at the request of defense counsel would have been protected in California under the attorney-client privilege and the work-product doctrine.[11] A decision taken out of fear of legally impossible event, based on a misunderstanding of basic litigation rules, cannot qualify as sound trial strategy. *See, e.g., Thompson v. Calderon,* 120 F.3d 1045, 1051-55 (9th Cir. 1997) (the "prosecutor could not have introduced evidence that Brower had consulted with but not called an independent pathologist"), *rev'd on other grounds,* 523 U.S. 538 (1998);[12] *United States v. Tarricone,*

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[11] *See* Cal. Evid. Code § 952; *Jones v. Superior Court,* 58 Cal. 2d 56, 60-61 (1962) (report of physician who examined client at behest of attorney protected by attorney-client privilege); *County of Los Angeles v. Superior Court,* 222 Cal. App. 3d 647 (1990) (attorney work-product privilege intact even where defendant later chose for tactical reasons not to call previously designated medical expert to the witness stand).

[12] Brower was the attorney in the *Thompson* case. There, Brower briefly consulted with a pathology expert but later cut off the consultations and failed to call the expert as a witness. Had the expert been fully consulted, he would have offered an extremely exculpatory opinion. Brower's explanation for failing to pursue the expert's testimony was the same as it is here: he feared that if he later decided for some reason not to use the expert as a witness, the prosecutor would "find out and use this fact against him." *Id.* at 1052. The Ninth Circuit rejected this argument

996 F.2d 1414, 1419 (2d Cir. 1993) (in tax evasion case, defense counsel's failure to consult handwriting expert not a strategic decision, because counsel "would not have been required to disclose a report by a handwriting expert unless he intended to make use of the expert, or a report by the expert, at trial").

Second, Brower's explanation is that he hoped a delay would cause Dawson to "wise up" and realize that he had to lie to the examining psychiatrists in order to defend himself. It is not a legitimate trial tactic to create the conditions for one's client to lie. *See United States v. Boone,* 62 F.3d 323 (10th Cir. 1995).

C. Petitioner Was Prejudiced As A Result Of Brower's Unprofessional Errors

To prove prejudice, the petitioner is not required to show that he would have been acquitted, but rather only the possibility of a conviction on a lesser charge. *Strickland,* 466 U.S. at 695 (prejudice measured by the "likelihood of a result more favorable to the defendant"); *Chambers v. Armontrout,* 907 F.2d 825, 832 n.13 (8th Cir. 1990).

Brower's failure to cross-examine Kearns produced the same prejudicial result as the State's use of Kearns' false testimony: It prevented Dawson from arguing that he shot Dona "upon a sudden quarrel or heat of passion," and it undermined the basis of the experts' opinions. In addition, Brower's delay in ordering a mental evaluation further eroded the credibility of the experts, to the detriment of his client. *See Bloom v. Calderon,* 132 F.3d 1267, 1278 (9th Cir. 1997) (finding prejudice where counsel delayed psychi-

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as "specious," *id.,* and found that Thompson had been denied the right to effective assistance of counsel.

atric evaluation of defendant and where "[c]ounsel's theory of defense rested, at least in part, on a psychiatric defense").

In a case where the only issue for adjudication was the defendant's level of intent, these critical omissions were sufficient to "undermine confidence in the outcome." *Strickland,* 466 U.S. at 694.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 9, 2000

APPENDIX

APPENDIX A

[Stamped:
FILED
JUN 22 2000
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS]

Not for Publication
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* * * * * * * * * * * * *

DONALD E. DAWSON,	*	
Petitioner-Appellant,	*	No. 96-56724
v.	*	
JAMES GOMEZ, Warden;	*	D.C. No. CV-
ATTORNEY GENERAL OF THE	*	94-00956-AHS
STATE OF CALIFORNIA,	*	
Respondents-Appellees.	*	MEMORANDUM*

* * * * * * * * * * * * *

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted December 6, 1999
Pasadena, California

Before: **B. FLETCHER, KOZINSKI** and **THOMPSON,**
Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

1. Even if Gomez's answer to Dawson's habeas petition was deficient, the district court did not abuse its discretion in choosing to adjudicate Dawson's claim on the merits. See Williams v. Calderon, 52 F.3d 1465, 1483 (9th Cir. 1995) (any grievance based on the state's inadequate response to a habeas petition "must be with that decision, not the filings that preceded it"). The same is true of Dawson's claim that the district court erred by adjudicating the three habeas claims for which he never received Gomez's answers.

2. Brower's strategic decisions not to try to impeach Kearns; not to call Dawson's ex-wife, brother and former paramours; to dissuade Dawson from testifying; to delay Dawson's psychiatric examination; and to play the audio tapes in their entirety before the jury are presumed to be proper under Strickland v. Washington, 466 U.S. 668, 690 (1984). Even were we to assume some of these choices were questionable, they were not prejudicial in light of the overwhelming evidence against Dawson.

3. Under Hughes v. Borg, 898 F.2d 695 (9th Cir. 1990), a lawyer can make concessions in order to gain credibility with the jury. See id. at 703. Brower did so here by saying that he would not make excuses for Dawson or defend what he had done, but would only see to it that he was represented and that the evidence was properly interpreted. Contrary to Dawson's allegations, this did not constitute abandonment.

King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), is not to the contrary. In that case, an inexperienced lawyer was held to have provided ineffective assistance when he failed to present available mitigating evidence and stated that he reluctantly represented his client because of the heinous allegations against him. Id. at 1464. Additionally, the defendant in King was convicted on the basis of circumstantial evidence; evidence that "however strong leaves room for doubt that a skilled attorney might raise to a sufficient level that, though not enough to defeat conviction,

might convince a jury and a court that the ultimate penalty should not be exacted, lest a mistake may have been made." Id.

In King, the lawyer's statements left the impression that he believed his client did not have a valid defense. This is very different from Brower's statement, which was a tactical retreat to minimize the sting of certain aspects of the government's case -- such as Dawson's confession -- that could not be ignored. Unlike King's lawyer, Brower was quite vigorous in mounting a defense in those areas where he could credibly do so. This certainly does not amount to abandonment.

4. An improper jury instruction requires reversal only when the resulting conviction violates due process. Masoner v. Thurman, 996 F.2d 1003, 1006 (9th Cir. 1993). "A single instruction is not viewed in isolation, but in the context of the overall charge." United States v. Harrison, 34 F.3d 886, 889 (9th Cir. 1994) (citing United States v. Marsh, 894 F.2d 1035, 1040 (9th Cir.1989)). There was no due process violation here because the trial judge instructed the jurors to consider Dawson's mental state, even though he deviated from the precise wording of the California Jury Instruction.

5. Finally, there was no error in the district court's rejection of Dawson's remaining claims. Insofar as Dawson has not demonstrated that Kearns's testimony was perjured, he cannot succeed on a claim that the prosecutor knowingly used perjured testimony by putting her on the stand. And since he has. not demonstrated any prejudicial error, Dawson's cumulative effect argument has no merit.

AFFIRMED.

APPENDIX B

[Stamped:
FILED: MAY 14, 1996
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONALD EMIL DAWSON	)	CASE NO. SACV 94-956-AHS (EE)
Petitioner,	)	
	)	REPORT AND
v.	)	RECOMMENDATION
	)	OF UNITED STATES
JAMES GOMEZ, et al.	)	MAGISTRATE JUDGE
	)	ON A PETITION FOR
Respondents.	)	WRIT OF HABEAS
	)	CORPUS BY A PERSON
	)	IN STATE CUSTODY

This report and recommendation is submitted to the Honorable Alicemarie H. Stotler, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

1. Introduction and background.

Petitioner was convicted of first degree murder in state court following a jury trial. The jury also found that

petitioner used a firearm when committing the offense. However, the special allegation of "lying in wait" was found to be untrue. Petitioner was sentenced to 25 years to life in state prison, with a consecutive two-year enhancement for the firearm use. Petitioner's conviction was affirmed on appeal. (Respondents' Supplemental Answer (SA), exh. A at 30).

Petitioner filed the present petition on October 25, 1994, raising 11 substantive grounds for relief. This is his third attempt at seeking federal habeas relief. Respondents filed an answer to the petition on November 22, 1994, which was timely supplemented on January 19, 1995, contending that petitioner had abused the writ. Petitioner timely filed a traverse.

On August 14, 1995, the magistrate judge issued an order finding that, because petitioner's two previous federal habeas petitions (Case Nos. SACV 90-669-AHS(RWR) and SACV 94-226-LHM(RWR)) were ultimately dismissed without prejudice, his third petition did not constitute an abuse of the writ. Respondents were then ordered to lodge a record of the state court proceedings and brief the merits of petitioner's claims. Respondents filed a second supplemental answer (SSA) on October 19, 1995. Petitioner filed a timely second traverse (2nd Traverse). The case is now ready for decision.

2. Petitioner's contentions.

Petitioner challenges his conviction, contending that:

a. Trial counsel rendered ineffective assistance as follows:

(1) Trial counsel failed to have petitioner examined to determine his mental competency to stand trial;

(2) Trial counsel unreasonably delayed in obtaining a mental examination of petitioner to determine his mental state at the time of the murder;

(3) Trial counsel failed to impeach Judy Kearns with her prior inconsistent statement;

(4) Trial counsel failed to call witnesses with knowledge of petitioner's mental state near the time of the murder;

(5) Trial counsel prejudiced petitioner by playing tape recorded statements for the jury;

(6) Trial counsel coerced petitioner into waiving his right to testify on his own behalf by giving him erroneous and misleading information;

(7) Trial counsel abandoned petitioner during his closing argument;

b. The prosecutor violated petitioner's due process right to a fair trial when he failed to correct Judy Kearns', allegedly false testimony;

c. The trial court violated petitioner's due process right to a fair trial as follows:

(1) The trial court instructed the jury that they could consider evidence of petitioner's mental disorders on the issue of malice;

(2) The trial court refused to give an instruction clarifying the issue of malice; and

d. Cumulative errors violated petitioner's due process right to a fair trial.[1]

3. Facts.

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[1] Petitioner raises, as a separate ground for relief, the contention that the state courts' findings of fact are not entitled to the presumption of correctness under 28 U.S.C. § 2254(d). This contention is considered in conjunction with petitioner's other claims, as appropriate.

The facts underlying petitioner's conviction are not disputed. On the morning of September 15, 1984, petitioner ended a stormy, on-again-off-again, love/hate relationship when he shot and killed his ex-wife Dona Dawson.

At the time of the shooting, petitioner was employed as an assistant dean of instruction at Saddleback College. (RT 1214-15).[2] He had previously worked as a law enforcement officer and had taught courses in the administration of justice. (RT 1266-68). Although petitioner and the victim had been divorced for several years, they would periodically enter into a relationship with each other and discuss reuniting. (RT 638-39, 648, 1481).

Petitioner had encountered the victim the previous. evening at a restaurant while she was in the company of Robert Baker, a man she had been dating for several months. (RT 224-25). Rather than return home after their date, the victim spent the night at Baker's. (RT 225).

Over the course of that evening, petitioner called the victim's home leaving several messages on her answering machine. (RT 211-16). At some point, he went over to her house bringing several guns, a set of handcuffs and some rope. (RT 46, 198-202). Petitioner parked his red Cadillac on a neighboring street. (RT 59).

The victim arrived home shortly after 9:00 a.m. the next morning. She entered the house and set her purse and a styrofoam coffee cup on the kitchen counter. (RT 196-97). Petitioner apparently confronted the victim, and they may have argued. Petitioner fired several shots at the victim from

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[2] Four sets of transcripts of the state court proceedings have been submitted to the court. To avoid confusion, references to the different sets of transcripts are distinguished as follows: the clerk's transcript is referred to as "CT;" the supplemental clerk's transcript is referred to as "SCT;" the reporter's transcript is referred to as "RT;" and the reporter's supplemental transcript is referred to as "RST."

inside the house, four of which struck the door leading to the garage from the house. (RT 87). The victim ran outside.

A neighbor, Judy Kearns, heard a shot from her kitchen and came to her door. (RT 33). The neighbor heard the victim scream and say "Oh God, no, no, no, no." (RT 34). Then she heard five more shots fired. (RT 34). After calling 911, the neighbor went outside to comfort the victim-who lay bleeding on the sidewalk. (RT 35-37). Petitioner told the neighbor "Judy, I had to do it." (RT 37).

A man driving nearby actually witnessed petitioner shoot the victim five times while standing over her. (RT 23-25). The victim died from massive bleeding. (RT 190).

The victim's boyfriend, Baker, called her home just after the shooting occurred. Petitioner answered the phone and told the boyfriend that he had just killed the victim and that the boyfriend had better call the sheriff. (RT 217, 225-26).

When sheriff's deputies arrived, petitioner was holding a plastic cup half-filled with wine. (RT 44). Petitioner spontaneously admitted shooting the victim. (RT 44). Petitioner requested an intoxilyzer test while en route to the sheriff's station. (RT 53). His blood was eventually drawn at noon, and petitioner commented to the nurse who drew it, "You are going to note the time, aren't you?" (RT 105). At trial, petitioner's blood-alcohol level at the time of the shooting was estimated at between .11 and .12 percent. (RT 112).

Trial counsel Robert Brower met with petitioner, petitioner's brother, and the brother's girlfriend at the jail that night. (RT 1189, 1514). Trial counsel was referred by a friend of petitioner's from the college. (RT 1173, 1189). Before leaving, trial counsel met with petitioner alone, and petitioner related what had occurred.

(RT 1514-18). According to trial counsel, petitioner told him "You know went over there to kill her. "[3] (RT 1519).

Trial counsel met with petitioner's brother and the brother's girlfriend outside the jail and told them that it was of the utmost importance to retain mental health experts immediately. (RT 1193-94, 1573). Within a few days of his arrest, petitioner's parents paid trial counsel $5,000 as a retainer and $3,000 to hire mental health experts end cover general investigation expenses. (RT 1193-94, 1233, 1240, 1272, 1494-95) .

Petitioner was charged with first degree murder with a firearm use allegation and the special circumstance of lying in wait. (RST 2-3). Petitioner attempted to commit suicide approximately three weeks after his arrest by cutting his neck and wrist with the blade from a plastic razor. (RT 550-68). Soon after, trial counsel obtained a court order allowing petitioner's friend, Robert Ferguson, a psychologist and former police officer, to meet with petitioner weekly. (RT 1282-83, 1286, 1527).

Despite initially telling petitioner's family that a mental health expert should be hired to evaluate petitioner immediately, none was hired until a little over one year later. Trial counsel later testified that, within 30 days of petitioner's arrest, he made a conscious decision against sending a mental health expert in to evaluate petitioner. (RT 1529). According to trial counsel, on the night of his arrest, petitioner told him that he intended to kill the victim and related the facts leading to the shooting with "such clarity and such precision" that an expert would conclude that he "understood the nature and quality of the acts when he committed them and when he undertook to commit them or plan them." (RT 1523).

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[3] Petitioner waived the attorney-client privilege before trial counsel testified. (RT 1513-14).

On June 19, 1986, petitioner entered a plea of not guilty by reason of insanity. (CT 286). Several mental health experts eventually testified at trial that it was their opinion that petitioner's mental state at the time of the offense prevented him from forming the intent to kill. (RT 685-87, 787-89, 828, 854-55, 864). Petitioner waived his right to testify. (RT 880-81). During closing argument, trial counsel told the jury that the only issue they had to decide was petitioner's mental state. (RT 948). Trial counsel argued that petitioner was a desperate and disturbed man who was "losing it," and that the jury should find him guilty of manslaughter rather than first degree murder. (RT 961-64, 970-71).

On November 19, 1986, the jury returned a verdict of guilty of first degree murder, and found that the firearm use allegation was true, but that the lying in wait special circumstance was not true. (RT 1023-24).

On December 1, 1986, trial counsel was relieved at petitioner's request, and Attorney David Haigh was appointed to represent petitioner for the sanity trial phase. (CT 472) . An initial motion for a new trial was denied in January 1987. (CT 480). Petitioner also withdrew his plea of not guilty by reason of insanity in March 1987. (CT 505).

A second motion for a new trial was brought in October 1987, alleging that trial counsel was ineffective for delaying petitioner's mental health evaluation for 13 months, for failing to call certain witnesses, for failing to impeach a witness, and for coercing petitioner into waiving his right to testify on his own behalf. An extensive hearing was conducted on the motion. (RT 1171-1807). Numerous witnesses testified, including petitioner and trial counsel. Trial counsel testified that he called in medical experts after petitioner told him that, rather than going over to the victim's house intending to kill her, he had only intended to try to

control her-by tying her up if necessary-in order to get her to listen to him. (RT 1530-31).

Petitioner contended that he had told trial counsel from the beginning that his only intent in going over to the victim's home with the guns, handcuffs and rope was to control her and make her listen. (RT 1711-15). Petitioner denied ever telling trial counsel that he went to the victim's home intending to kill her. (RT 1714-15).

In denying the motion for new trial, the court found that the evidence did not show a failure to explore a valid defense or failure to investigate by trial counsel, but merely showed that trial counsel made some strategic decisions. (RT 1797). The court found that evidence of petitioner's actions before and after the killing presented problems regarding a mental defense and that the decision to delay a mental health evaluation was not out of line with the evidence and "was a conclusion a competent attorney reached." (RT 1798).

The court also found that petitioner failed to meet his burden of establishing that he was "denied a fair trial on any of the issues presented: effective representation of counsel, the jury instruction or that the evidence was insufficient to support the verdict." (RT 1799). Petitioner was later sentenced to 25 years to life, plus two years to run consecutive for the firearm use allegation. (RT 1805).

4. Discussion.

Both sides submitted voluminous briefs in this case which address the numerous, but not complicated, contentions. No substantive issue presents a close question, and respondents' position is clearly supported by the law and facts on each issue except procedural bar.

a. Procedural contentions.

Respondents contend that petitioner is procedurally barred from raising the claims set forth above as claims a(1), a(7), b, c(l) and c(2) . (SSA at 4).

Generally, when a state court clearly denies a habeas petition for failure to comply with a state procedural rule, federal habeas relief is not available. Coleman v. Thompson, 501 U.S. 722, 729, 115 L.Ed.2d 640, 655 (1991); Wells v. Maas, 28 F.3d 1005, 1008 (9th Cir. 1994). In applying this rule, the court must first examine the basis of the relevant state court judgment. See Coleman v. Thompson, 501 U.S. at 732-35, 115 L.Ed.2d at 657-59; Wells v. Maas, 28 F.3d at 1008; Hunter v. Aispuro, 982 F.2d 344, 347 (9th Cir. 1992), cert. denied, ___ U.S. ___, 126 L.Ed.2d 194 (1993).

In interpreting an order by the California Supreme Court denying a petition, this Court will look only to the order, if it is clear. If the order states that the denial was on state procedural grounds, or if the order cites state authority "indicating that the habeas petition was procedurally deficient," this Court will construe the denial as not being a decision on the merits. Hunter v. Aispuro, 982 F.2d at 347.

If the California Supreme Court denies a habeas petition without comment and without explanatory state authority, this Court looks to the last reasoned lower court decision and assumes that the California Supreme Court's decision was on the same ground. Ylst v. Nunnemaker, 501 U.S. 797, 803, 115 L.Ed.2d 706, 716 (1991). If the last reasoned state decision relied on an independent and adequate state ground, then this Court treats petitioner's claims as procedurally barred. Coleman v. Thompson, 501 U.S. at 735, 115 L.Ed.2d at 659; Siripongs v. Calderon, 35 F.3d 1308, 1316-17 (9th Cir. 1994), cert. denied, __ U.S. __, 130. Ed.2d 1127 (1995). If the last reasoned state decision denying the petition did not clearly rely on an independent and adequate state ground, then this Court treats the denial as being on the merits and thus treats the claims as not procedurally barred. Id.; Hunter

v. Aispuro, 982 F.2d at 347; Siripongs v. Calderon, 35 F.3d at 1317.

Respondents contend that petitioner's first claim, that trial counsel was ineffective for failing to determine his competency to stand trial, was procedurally barred in state court as unnecessarily and unreasonably delayed. (SSA at 17). However, in denying the claim on state habeas review, the California Supreme Court simply stated "Petition for writ of habeas corpus DENIED." (SA, exh. O). This Court must interpret that summary denial as being on the merits, unless there was a reasoned decision of a lower court to the contrary. Respondents cite none. Accordingly, the magistrate judge finds that petitioner is not procedurally barred from obtaining federal habeas review of his first claim.

Respondents also contend that petitioner is procedurally barred from raising the claims identified above as claims a(7), b, c(l) and c(2), because he failed to raise these claims on direct appeal. (SSA at 32-34). The magistrate judge disagrees.

Regarding petitioner's claim that he was abandoned by trial counsel during closing argument, the California Supreme Court denied the claim without comment. (SA, exh. I). Respondents argue that the last reasoned state court opinion denied petitioner relief because he failed to raise the issue on direct appeal. (SSA 38-39) . It is not clear, however, that the claim was denied on an "independent and adequate state ground."

The California Court of Appeal denied petitioner's petition before it reached the California Supreme Court. However, the Court of Appeal's decision did not clearly rely on an independent and adequate state ground. Rather, it cited In re Bower, 38 Cal.3d 865, 872, 215 Cal.Rptr. 267, 270 (1985) and stated that petitioner had failed to establish a prima facie case of ineffective assistance of appellate counsel (for failing to raise the issue on appeal). (SA, exh. G). Bower

provides that habeas relief is generally not available for issues which should 'have been raised on direct appeal, unless the claim is tied to matters outside of the record. In re Bower, 38 Ca1.3d at 872, 215 Cal.Rptr. at 270.

However, California courts have not consistently enforced the rule referred to in Bower; rather, "California courts have repeatedly held that the rule that claims not raised on appeal are not cognizable on habeas is `merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue the writ.'" Karis v. Vasquez, 828 F.Supp. 1449, 1467 (E.D.Cal. 1993) (citing Bower for the principle that, in special circumstances, habeas relief will lie even though a remedy was available on appeal).

A procedural rule is not "adequate" to bar federal habeas review if the rule is discretionary. Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). This Court does not require as a prerequisite to federal habeas review that a petitioner comply with a state procedural rule that the state does not consistently enforce. See Siripongs v. Calderon, 35 F.3d at 1318 (citing Harmon).

Moreover, it is not clear that the state Court of Appeal itself believed the procedural rule of Bower provided an independent and adequate basis for its denial of habeas review. The part of its decision regarding appellate counsel was plainly on the merits. The last court that clearly stated its reasons for denying petitioner's claim was the Orange County Superior Court, and that Court expressly stated that it considered the merits of petitioner's claim. (SA, exh. F-89). Accordingly, this Court must treat the denial as having been on the merits, and it does not procedurally bar federal review. See Siripongs v. Calderon, 35 F.3d at 1317; see also Deere v. Calderon, 890 F.Supp. 893, 900 (C.D.Cal. 1995).

Respondents next contend that petitioner is procedurally barred from raising claims b, c(1) and c(2) above, because he should have raised them on direct appeal. However, the

record shows that petitioner did raise these claims to the California Supreme Court in 1993, and they were expressly denied on the merits. (SA, exh. M at 113, 116 & 117; exh. N). Accordingly, the magistrate judge finds that petitioner has not procedurally defaulted on those claims.

b. Assistance of counsel.

Petitioner contends that he received ineffective assistance of trial counsel and lists seven alleged errors by trial counsel.

The "benchmark" of any claim that the Sixth Amendment right to counsel has been violated is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 80 L.Ed.2d 674, 692-93 (1984). To prove his claim, petitioner must show that his attorney's representation fell below an objective standard of reasonableness. Id., at 688, 80 L.Ed.2d at 698. Under the second component, petitioner must demonstrate his counsel's errors rendered the result unreliable or the trial fundamentally unfair. Lockhart v Fretwell, 506 U.S. 364, __, 122 L.Ed.2d 180, 191 (1993).

The Strickland standard is "rigorous" and "highly demanding." Kimmelman v. Morrison, 477 U.S. 365, 381-82, 91 L.Ed.2d 305, 323 (1986). Petitioner must overcome a strong presumption that his lawyer was competent. See Smith v.Ylst, 826 F.2d 872, 875 (9th Cir. 1987), cert. denied, 488 U.S. 829, 102 L.Ed.2d 59 (1988); Morris v. California, 966 F.2d 448 (9th Cir. 1991), cert. denied, 506 U.S. 831, 121 L.Ed.2d 57 (1992). These standards are applied to each of petitioner's claims of ineffective assistance of counsel below.

(1) Failure to request determination of competency to stand trial.

Petitioner contends that trial counsel was ineffective for failing to seek an examination to determine his competency to stand trial. (Pet. at 6, 7A). Petitioner contends that his allegedly unstable mental condition at the time of arrest and suicide attempt a few weeks later obligated trial counsel to seek a competency examination. (Pet. at 7A).

"[T]he standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." Godinez v. Moran, 509 U.S. 389, ___, 125 L.Ed.2d 321, 330 (1993).

"In a habeas proceeding, a petitioner is entitled to an evidentiary hearing on the issue of competency to stand trial if he presents sufficient facts to create a real and substantial doubt as to his competency, even if those facts were not presented to the trial court." Boag v. Raines, 769 F.2d 1341, 1343 (9th Cir. 1985), cert. denied, 474 U.S. 1085, 88 L.Ed.2d 899 (1986).

The condition of petitioner's mental state at the time of the offense and his suicide attempt-two years before trial-do not constitute sufficient facts to create a real and substantial doubt as to his competency to stand trial. Moreover, petitioner's testimony during the hearing on his motion for a new trial contradicts his contention that he was not competent to stand trial. Petitioner ably consulted with his lawyer from their first meeting on. Petitioner related the facts of what had occurred to trial counsel; he reviewed and comprehended materials sent to him by trial counsel (police reports, code provisions, and jury instructions); and at trial he discussed the discrepancy in witness Judy Kearns' trial testimony with trial counsel and also discussed whether he should testify on his own behalf. (RT 1335-37, 1274-77, 1278-80, 1339, 1523, 1720-22).

Accordingly, the magistrate judge finds that petitioner has failed to meet his burden to show that trial counsel acted unreasonably in not seeking a determination of petitioner's competency to stand trial.

(2) Delay in seeking mental health evaluation.

Petitioner next contends that trial counsel was ineffective in failing to seek an immediate mental health evaluation after his arrest and that the 13-month delay in obtaining such evaluations prejudiced petitioner and had a substantial and injurious effect on the jury's verdict. (Pet. at 6, 7A-7B).

Trial counsel testified that he purposely delayed the mental health evaluations because, on the night of his arrest, petitioner had been extremely remorseful and had told trial counsel that he intended to kill the victim. (RT 1519, 1521). Trial counsel was concerned that if petitioner told this to a mental health expert that the expert would conclude that petitioner appreciated the difference between right and wrong and harbored the intent to kill. (RT 1523). Trial counsel also wanted to keep petitioner's suicide attempt from the jury. (RT 1526). Trial counsel was additionally concerned that. the prosecution would review jail visitation records and see that a mental health expert had seen petitioner and utilize that information to hurt petitioner at trial. (RT 1503).

During the trial, the prosecutor emphasized the lengthy delay when he cross-examined the expert witnesses who evaluated petitioner. (RT 702-05, 708, 746, 756, 795, 829-30, 864-65, 870). The prosecutor also raised the delay to the jury during his closing argument. (RT 939-41, 944, 972).

Three criminal defense attorney experts testified about the delay during the hearing on petitioner's motion for a new trial. Each was of the opinion that a reasonably competent attorney would have had petitioner evaluated by a mental health expert as soon as possible after his arrest. (RT 1369-

70, 1431-32, 1455). Even if petitioner had expressed that he intended to kill the victim, two of the experts said this would not change their opinion about needing to conduct an immediate mental evaluation. (RT 1433-34, 1456-57).

In ruling on the issue of the 13-month delay, the court stated:

> The issue of the 13-month delay for the psychological or psychiatric evaluation raises a significant issue on its face. But in analyzing it and receiving the testimony at the motion for new trial, I think Mr. Brower adequately explains the reasoning behind his decision. (RT 1796).

The court found that trial counsel's initial contact with petitioner on the night of his arrest was a "significant component" which the experts lacked. (RT 1796-97). Then the court went on to find that even if the decision to delay was unreasonable, it was not prejudicial in light of other overwhelming evidence. (RT 1797-98).

Contrary to respondents' assertion, in deciding mixed questions of act and law, "the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard." Summer v. Mata, 455 U.S. 591, 597, 71 L. Ed.2d 480, 486 (1982). On the other hand, "28 U.S.C. § 2254(d) gives federal courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." Marshall v. Lonberger, 459 U.S. 422, 434, 74 L.Ed.2d 646, 658 (1983).

Both petitioner and trial counsel testified as to what was said at the jail on the night of petitioner's arrest. They disagreed over whether petitioner told trial counsel that he went to the victim's home intending to kill her. While the attorney experts may have decided to proceed with an

immediate mental health evaluation in spite of petitioner's disclosure, none of them had the benefit that trial counsel had of personally observing petitioner's remorseful demeanor or hearing the detailed account of his actions less than 24 hours after the crime was committed.

The state court's failure to grant petitioner relief on this issue is tantamount to an express finding against the credibility of petitioner. The transcript of the trial court's opinion makes it clear that the judge believed trial counsel as to what petitioner said to trial counsel that first night. This finding is entitled to a presumption of correctness under §2254(d). In light of the state court's finding about the witnesses' credibility, the magistrate judge finds that trial counsel made a reasoned tactical decision to delay having petitioner evaluated by mental health experts. Given the facts reasonably believed by the trial attorney, it cannot be concluded that his decision was in any way deficient. Accordingly, petitioner has failed to meet his burden of showing that trial counsel's decision to delay seeking a mental health evaluation for 13 months was objectively unreasonable.[4]

(3) Failure to impeach Judy Kearns.

Petitioner contends that trial counsel was incompetent for failing to impeach the victim's neighbor, Judy Kearns, with her prior inconsistent statements. (Pet. at 7, 7B).

At trial, the neighbor testified that she heard a single shot, a woman's very loud scream, and then five more shots. (RT 33-34). She also testified that she did not hear any loud noises from the victim's residence before hearing the first shot. (RT 38). During the preliminary hearing, however, the

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[4] Because petitioner has failed to show that trial counsel acted unreasonably, it is unnecessary to determine whether the 13-month delay prejudiced petitioner by rendering the proceeding fundamentally unfair.

neighbor had testified to hearing what "sounded like an angry conversation first." (CT 31-32). Trial counsel did not question the neighbor about her inconsistent testimony, but reserved the right to recall her later. (RT 41).

At the hearing on petitioner's motion for a new trial, trial counsel explained that he refrained from cross-examining the neighbor because he wanted to find out first why she changed her testimony. (RT 1566). When the neighbor was contacted by the defense, she was adamant that the court reporter omitted an "if" from her statement at the preliminary hearing, altering the context of her testimony. (RT 1567). She also denied hearing any arguing before hearing the first shot. (RT 567). Trial counsel testified that he made a tactical decision not to recall the neighbor to impeach her. (RT 1568).

A trial attorney has wide discretion in making tactical decisions. Strategic choices made after thorough investigation of the relevant acts are virtually unchallengeable. Strickland v. Washington, 466 U.S. at 690-91, 80 L.Ed.2d at 695. A review of the record shows that counsel's testimony about his reasoning was logical and credible. Accordingly, the magistrate judge finds that petitioner has failed to meet his burden of showing that trial counsel's decision not to try to impeach the neighbor with her preliminary hearing testimony was objectively unreasonable.

(4) Failure to call civilian witnesses.

Petitioner contends that trial counsel rendered ineffective assistance by failing to call civilian witnesses to testify regarding petitioner's mental state before the shooting. (Pet. at 7, 7B-7C). Petitioner contends that trial counsel should have called his former wife, Dorothy Dawson, his brother, Robert Dawson, and three other women with whom petitioner had previously had relationships. (Id.).

Petitioner raised this issue in his motion for a new trial and four of the five proposed witnesses testified.[5] Trial counsel testified that he wanted to minimize evidence showing that petitioner frequently pursued relationships with other women while pursuing, or being pursued by, the victim. (RT 1562-64). Similarly, because petitioner had been unfaithful to his first wife Dorothy, trial counsel felt he could minimize petitioner's involvement with other women by not calling her to testify. . (RT 1564-65). Trial counsel's reasons for not calling petitioner's brother were not elicited at the hearing.

The record shows that trial counsel was aware of these witnesses and either he or his investigator spoke with them at various times and that he was aware of what they might say if called to testify. Moreover, trial counsel did call two civilian witnesses to testify about petitioner's mental state before the shooting. (See Testimony of Davene Kirk (RT 420-34) and Trudy Baggs (RT 435-58)). Therefore, under the circumstances, trial counsel's decision not to call additional witnesses was part of a trial strategy falling into the "'wide range of reasonable professional representation,' and cannot be considered ineffective assistance." Morrison v. California, 966 F.2d at 456 (citing United States v. Murray, 751 F. 2d 1528, 1535 (9th Cir.), cert. denied, 474 U.S. 979, 88 L.Ed.2d 335 (1985)).

In addition, petitioner had an opportunity to express his dissatisfaction with the number of witnesses called when he waived is right to testify and expressly refrained from doing so. (RT 881). Accordingly, the magistrate judge finds that petitioner has failed to carry his burden to show that trial

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[5] Dorothy Dawson (RT 1199-1214, 1701-06), Robert Dawson (RT 1178-98, 1707-09), Maureen Smith (RT 1245-56), and Minna Adams (RT 1350-59) testified, but Rosana Chui did not.

counsel's conduct fell below an objective standard of reasonableness.

(5) Introduction of tape-recorded interviews.

Petitioner contends that trial counsel rendered ineffective assistance and unduly prejudiced him by introducing three interviews which were tape-recorded by law enforcement. (Pet. at 7C-7D).

The tape-recorded interviews were with Norma Gibson (RT 490-514), Kathy Ruegger (RT 516-548), and Terri Whitt (RT 575-652), three of the victim's closest friends. The tapes were offered as evidence of a portion of the material relied on by the mental health experts in forming their opinions about petitioner's mental state. (RT 416). Trial counsel later testified that he wanted the jury to hear how the victim had pursued a relationship with petitioner and that the way the experts described their relationship was the way the victim's friends saw it, too. (RT 1545). Portions of the interviews are far from flattering. However, they tend to support the description petitioner provided to the experts of his relationship with the victim and tend to support the experts' opinion as to petitioner's deteriorating mental state before the killing occurred.

The magistrate judge finds that petitioner has failed to meet his burden of showing that trial counsel's decision to introduce the taped interviews was objectively unreasonable. Accordingly, it is unnecessary to decide whether the decision to introduce the tapes unnecessarily prejudiced petitioner.

(6) Waiver of right to testify

Petitioner contends that trial counsel rendered ineffective assistance by coercing him into waiving his right to testify on his own behalf. (Pet. at 7D). Specifically, petitioner alleges that trial counsel erroneously and misleadingly told him that if he did testify, the prosecution would call the

victim's daughter, Rochelle Clawson, as a rebuttal witness and the daughter would cry in front of the jury. (Id.).

Trial counsel was able to keep the daughter from testifying during the prosecution's case-in-chief by entering into a stipulation about what she would say. (RT 278-80). Before the stipulation was entered into, however, the daughter took the stand outside of the jury's presence. (RT 256-265). Trial counsel described her demeanor as "openly crying." (RT 268). In accepting the daughter's stipulated testimony, the trial court did not preclude the prosecution from recalling her and even stated that it was a "possibility she could be recalled." (RT 276). Thus, petitioner has failed to show that trial counsel's statement to him was erroneous or misleading.

Before advising petitioner not to testify, trial counsel went over the facts of the case with him several times. (RT 1555). Trial counsel had another criminal defense attorney conduct a mock cross-examination of petitioner, and that attorney told trial counsel it was his opinion that petitioner should not testify. (RT 1556). Trial counsel conducted his own mock cross-examination of petitioner in the presence of defense investigator Jim Box, who thought petitioner would make a bad witness. (RT 1556-57). Petitioner does not dispute that these acts were undertaken by trial counsel.

The trial court elicited petitioner's in-court waiver of his right to testify. (RT 880-81). Before accepting the waiver, the trial court explained that, despite trial counsel's advice that he not testify, it was still petitioner's decision to make. (RT 880). Petitioner told the court: "It is my decision not to testify." (RT 880).

In light of the foregoing, the magistrate judge finds that petitioner has failed to meet his burden of showing that trial counsel was objectively unreasonable in advising him not to testify at trial.

(7) Trial counsel's closing argument.

Petitioner lastly contends that trial counsel rendered ineffective assistance by abandoning him during closing argument. Petitioner alleges that trial counsel's statement to the jury that he was not there to make excuses for petitioner, but to see that he was properly represented and that the evidence was properly introduced, constitutes abandonment. (Pet. at 7D-7E). This contention is meritless.

The primary issue before the jury was petitioner's mental state at the time of the killing -- whether he intended to kill the victim and whether he was "lying in wait" to ambush her. Trial counsel's closing argument effectively presented these issues to the jury. (See RT 948, 954, 956-64). Trial counsel argued that the crime was one of jealousy and passion, amounting to voluntary manslaughter only. (RT 970-71). The statement which petitioner complains about, when viewed in context with petitioner's open admission that he shot the victim and the balance of the closing argument, was consistent with the defense theory of the case - to admit the killing, but persuade the jury to find petitioner lacked malice aforethought and that the killing was not premeditated. That this might have seemed like asking the jury to acquit on a "technicality" - as some would view a mental defense - could quite reasonably justify an argument effectively asking the jurors to separate the admittedly heinous acts from the mental state of the actor. Otherwise, trial counsel was concerned that the jurors would "throw up [their] hands and say 'who cares?'" (RT 949).

Accordingly, the magistrate judge finds that petitioner has failed to show that trial counsel's argument to the jury was objectively unreasonable.

c. Use of false testimony.

Petitioner contends that the prosecutor knowingly presented false testimony when he failed to "correct" the

neighbor Judy Kearns' trial testimony with her prior inconsistent preliminary hearing testimony. (Pet. at 7E-7F).

"'[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have [a]ffected the judgment of the jury.'" United States v. Young, 17 F.3d 1201, 1203 (9th Cir. 1994) (quoting United States v. Agurs, 427 U.S. 97, 103, 49 L.Ed.2d 342, 249-50 (1976)). To merit habeas relief, petitioner must show that: 1) the witness' testimony was false; 2) the prosecutor knew that the witness' testimony was false; and 3) there is a reasonable likelihood that the witness' testimony affected the verdict. See United States v. Necoechea, 986 F.2d 1273, 1281 (9th Cir. 1993).

As discussed above, the neighbor testified differently at trial than she had at the preliminary hearing about what she initially heard in regard to the shooting. (RT 33-34, 38; cf., CT 31-32). However, petitioner has presented no evidence to show that her testimony was actually false. Accordingly, the magistrate judge finds that petitioner failed to meet his burden of showing that he is entitled to habeas relief on this claim.

d. Jury instructions.

(1) Instruction limiting use of mental disorders to determine issue of malice.

Petitioner contends that he was deprived of his right to a fair trial because the trial court instructed the jury that it could consider evidence of petitioner's mental state only in determining whether he had malice aforethought and specific intent. (Pet. at 7F).

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution,

laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, __, 116 L.Ed.2d 385, 396 (1991); see 28 U.S.C. § 2254(a). Habeas relief is not available for an alleged error in the interpretation or application of state law. Id. at __, 116 L.Ed.2d at 396; Jamal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991).

To the extent petitioner claims the jury instruction was incorrect under state law, his claim is not cognizable on federal habeas review. Estelle v. McGuire, 502 U.S. at __, 116 L.Ed.2d at 398. To merit relief, petitioner must show that the instructional error "so infected the entire trial that the resulting conviction violates due process." Id. At __, 116 L.Ed.2d at 399 (quoting Cupp v. Naughten, 414 U.S. 141, 147, 38 L.Ed.2d 368 (1973)). The allegedly erroneous instruction must be considered in the context of the trial record and the instructions as a whole. Id.

After reviewing the trial record and the jury instructions, the magistrate judge finds that petitioner's contention that the trial court improperly limited the jury's consideration of evidence of his mental state is not supported by the record. The jury was instructed that it could consider evidence of any mental disorder to determine whether petitioner had either malice aforethought for first degree murder or specific intent for involuntary manslaughter. (RT 995). The jury was further instructed that, if it found petitioner had a mental illness or defect, it could consider what affect his mental condition had on his ability to form "the specific mental states that are essential elements of murder and manslaughter." (RT 997).

In addition, the jury was told that if they found that petitioner's "mental condition was such that you have a reasonable doubt whether he did premeditate, deliberate or form an intent to kill, you cannot find him guilty of murder of the first degree." (RT 997). The jury was also told that any such doubt would prohibit finding petitioner had express

malice aforethought, and any reasonable doubt that he harbored express malice or specific intent would prohibit finding him guilty of either murder or involuntary manslaughter. (RT 997-98).

Accordingly, because the instructions given to the jury contradict petitioner's contention that the trial court unfairly limited the jury's consideration of his mental state in reaching their decision, petitioner has failed to show that any instructional error occurred.

(2) Refusal of defense-proposed instruction defining malice.

Petitioner contends that he was deprived of his due process right to a fair trial when the trial court refused to give a defense-proposed instruction defining malice which allegedly "pinpointed" the defense theory of the case. (Pet. at 7F-7G).

A claim that a trial judge erred by omitting-an instruction is cognizable only if the petitioner can show the omission so infected the entire trial that the resulting conviction violated due process. Henderson v. Kibbe, 431 U.S. 145, 154, 52 L.Ed.2d 203, 212 (1977); Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988). The significance of the omitted instruction should be evaluated by comparing it to the instructions that were given. Id. at 156, 52 L.Ed.2d at 213. Moreover, the omission of an instruction must so infect the trial as to deprive the jury of a fair trial under the Fourteenth Amendment. Dunckhurst v. Deeds, 859 F.2d at 114; Estelle v. McGuire, 502 U.S. at ___ 116, L.Ed.2d at 399. Assuming arguendo that the trial court's failure to give a jury instruction violated due process, federal courts must still assess whether the error had "substantial and injurious effect or influence in determining the jury's verdict." Brecht v.Abrahamson, 507 U.S. 619, ___, 123 L.Ed.2d 353, 373 (1993).

Petitioner's proposed instruction defined malice as follows:

> Malice involves an element of viciousness-an extreme indifference to human life. It is when a defendant, free from any mental impairment and not acting in the heat of passion, makes a voluntary choice to commit a person-endangering act.

(CT 449, 464). The instruction which was given to the jury defined malice as follows:

> Malice is express when there is manifested an intention unlawful to kill a human being.
>
> When it is shown that a killing resulted from the intentional doing of an act with express malice, no other mental state need by shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.
>
> Aforethought does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

(RT 1000, CT 400-01).

When considered in the context of the entire trial record and the instructions which were given-many of which reflect the defense theory of the case-petitioner fails to meet his burden of showing that the omission of the refused instruction so infected the entire trial that the resulting

conviction violated due process or that it had a substantial and injurious effect on the jury's verdict. Accordingly, the magistrate judge finds that petitioner has failed to show that he is entitled to relief on this claim.

e. Cumulative error.

Petitioner contends that the cumulative effect of errors committed during his trial rendered the proceedings fundamentally unfair. (Pet. at 7G-7H). The magistrate judge disagrees. Petitioner has failed to show that any substantial error occurred, much less that absent such errors, the outcome would have been different. Moreover, having reviewed the entire trial transcript, the magistrate judge concludes that the proceedings were fair and that petitioner received an adequate defense in view of the overwhelming evidence of his guilt.

4. Recommendation.

IT IS THE RECOMMENDATION of the magistrate judge that the Court approve this Report and Recommendation and enter judgment denying the petition with prejudice.

DATED: May 13, 1996

/s/
Elgin Edwards
United States Magistrate Judge

[Stamped:
FILED: OCT 8, 1996
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONALD EMIL DAWSON	)	CASE NO. SACV 94-956-AHS (EE)
Petitioner,	)	
	)	ORDER ADOPTING
v.	)	REPORTS AND
	)	RECOMMENDATIONS
JAMES GOMEZ, et al.	)	OF UNITED STATES
	)	MAGISTRATE JUDGE
Respondents.	)	

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has reviewed the petition and all of the records and files herein. The Court adopts the findings and recommendations of the United States Magistrate Judge attached hereto and orders that the judgment be entered denying the petition with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the reports and recommendations, and the Judgment herein by United States mail on all parties.

Dated: October 8, 1996

/s/
Alicemarie H. Stotler
United States District Judge

APPENDIX C

[Stamped:
FILED
DEC 29 1993
ROBERT WANDRUFF
CLERK, U.S. SUPREME COURT]

ORDER DENYING WRIT OF HABEAS CORPUS
No. S035420
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

IN RE DONALD E. DAWSON
ON
HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

/s/
Chief Justice

APPENDIX D

[Stamped:
FILED
JUN 9 1993
ROBERT WANDRUFF
CLERK, U.S. SUPREME COURT]

ORDER DENYING WRIT OF HABEAS CORPUS
No. S030805
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

IN RE DONALD DAWSON
ON
HABEAS CORPUS

Petition for writ of habeas corpus DENIED on the merits.

/s/
Chief Justice

APPENDIX E

[Stamped:
FILED
JUL 28 1994
ROBERT WANDRUFF
CLERK, U.S. SUPREME COURT]

ORDER DENYING WRIT OF HABEAS CORPUS
No. S039835
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

IN RE DONALD E. DAWSON
ON
HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

/s/
Chief Justice

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE
DEPARTMENT 47

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF,	)	
VS.	)	NO. C-55609
DONALD EMIL DAWSON AKA DONALD EMIL DOMBROWSKI, DEFENDANT.	)	

HONORABLE KATHLEEN E. O'LEARY, JUDGE
PRESIDING
REPORTER'S TRANSCRIPT
DECEMBER 18 & 21, 1987
JANUARY 14, 1988

APPEARANCES OF COUNSEL:

FOR THE PEOPLE: JAMES G. ENRIGHT
AND
BRENT F. ROMNEY
DEPUTY DISTRICT
ATTORNEYS

FOR THE DEFENDANT: JAMES BRUSTMAN
AND
G. DAVID HAIGH
ATTORNEYS AT LAW

LINDA C. ARONSON, C.S.R. 2967
OFFICIAL COURT REPORTER

SANTA ANA, CALIFORNIA – THURSDAY, JANUARY 14, 1988

MORNING SESSION

(THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT:)

THE COURT: NUMBER TWO ON THE CALENDAR, THE DAWSON MATTER.

COULD COUNSEL STATE YOUR APPEARANCES FOR THE RECORD, PLEASE.

MR. ENRIGHT: YES, YOUR HONOR. JAMES ENRIGHT FOR THE PEOPLE.

MR. BRUSTMAN: JAMES BRUSTMAN PRESENT WITH MR. DAWSON.

MR. ENRIGHT: BRENT ROMNEY ALSO FOR THE PEOPLE, YOUR HONOR.

THE COURT: THE MATTER HAS PREVIOUSLY BEEN SUBMITTED TO THE COURT. IS THERE ANYTHING ELSE THAT SHOULD BE ADDRESSED BEFORE THE COURT RULES?

MR. ROMNEY: PEOPLE WOULD SUBMIT, YOUR HONOR.

MR. BRUSTMAN: THE MATTER IS SUBMITTED.

THE COURT: I DID REVIEW THE EXHIBITS THAT WERE SUBMITTED TO THE COURT SINCE WE LAST MET ON THIS MATTER. IT WOULD APPEAR THAT THERE ARE THREE ISSUES THAT THE DEFENSE ADDRESSES:

THE FIRST WOULD BE THE EFFECTIVE REPRESENTATION OF COUNSEL ON THE PART OF

MR. BROWER. THE ISSUE OF THE 13-MONTH DELAY FOR THE PSYCHOLOGICAL OR PSYCHIATRIC EVALUATION RAISES A SIGNIFICANT ISSUE ON ITS FACE. BUT IN ANALYZING IT AND

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REVIEWING THE TESTIMONY AT THE MOTION FOR NEW TRIAL, I THINK MR. BROWER ADEQUATELY EXPLAINS THE REASONING BEHIND HIS DECISION.

OBVIOUSLY, OTHER LAWYERS TESTIFIED WHO DISAGREED WITH MR. BROWER'S CONCLUSION AS TO HOW TO HANDLE THE MENTAL DEFENSE ISSUE, BUT I THINK THAT OTHER LAWYERS IN HINDSIGHT - - ARGUABLY, HINDSIGHT IS ALWAYS 20/20 - - MAY SAY THAT THEY WOULD HAVE DONE IT DIFFERENTLY, BUT I DON'T THINK THAT'S THE STANDARD I SHOULD APPLY ON A MOTION FOR NEW TRIAL ON THE ISSUE OF EFFECTIVE REPRESENTATION OF COUNSEL.

I DID REVIEW THE MATERIALS THAT WERE GIVEN TO THE EXPERT WITNESSES THAT TESTIFIED AT THE MOTION. MR. GOLDFEIN, MR. BARUCH INDICATED THEY REVIEWED THE TRIAL NOTEBOOK, FOR WANT OF A BETTER TERM, THE COMPILATION OF REPORTS AND SO FORTH, AND THEY ALSO REVIEWED THE DEFENDANT'S NARRATIVE. MR. KOPENY INDICATED THAT HE DID NOT REVIEW THE NARRATIVE, AND THEY REVIEWED PORTIONS, BUT NOT ALL, OF THE TRIAL TRANSCRIPT.

I THINK THAT WHAT THEY REVIEWED ACCOUNTS SOMEWHAT FOR THE PERSPECTIVE FOR WHICH THEY REACH THEIR CONCLUSIONS.

IN REVIEWING MR. DAWSON'S ACCOUNT IN HIS NARRATIVE, I THINK THAT IT IS FACTUAL, BUT

IT'S INCOMPLETE, AT LEAST FROM MY KNOWLEDGE OF THE EVIDENCE AS IT CAME OUT AT THE TRIAL, AND I THINK IT IS SOMEWHAT SUBJECTIVE WHICH OBVIOUSLY ISN'T SURPRISING.

I THINK THAT THE EXPERT WITNESSES THAT TESTIFIED AT THE TRIAL LACKED A SIGNIFICANT COMPONENT THAT APPARENTLY

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MR. BROWER RELIED, ON AND THAT'S HIS PERSONAL CONTACT WITH DEFENDANT THAT EVENING, THAT FIRST EVENING IN THE JAIL, AND IN THE WEEKS AND MONTHS IMMEDIATELY FOLLOWING.

MR. BROWER EXPRESSED CONCERN ON HIS PART OVER MR. DAWSON'S ABILITY TO RATIONALLY AND LUCIDLY GIVE AN ACCOUNT OF WHAT HAD OCCURRED. I THINK MR. BROWER WAS CONCERNED THAT AT THAT POINT IN TIME MR. DAWSON WAS NOT EXHIBITING THE KINDS OF SYMPTOMS THAT A DEFENSE ATTORNEY LIKES TO SEE IF A DEFENSE ATTORNEY IS PREPARING A MENTAL DEFENSE.

I THINK THAT THE EVIDENCE DOESN'T DEMONSTRATE A FAILURE ON THE PART OF MR. BROWER TO EXPLORE A VALID DEFENSE OR A FAILURE TO INVESTIGATE THAT DEFENSE, BUT, RATHER, I THINK IT DEMONSTRATES THAT HE MADE SOME STRATEGY DECISIONS THAT THE DEFENDANT NOW DOESN'T AGREE WITH AND THE EXPERTS DON'T AGREE WITH AT THIS POINT IN TIME.

THE OTHER ASPECT I THINK OF THE ANALYSIS AS TO HOW MR. BROWER HANDLED THE CASE IS

EVEN IF THERE WAS A FAILURE ON THE PART OF MR. BROWER TO INVESTIGATE AND PREPARE THE MENTAL DEFENSE AT AN EARLIER STAGE THAN HE DID, THE COURT THEN HAS TO LOOK AS TO WHETHER THAT FAILURE RESULTED IN THE FAILURE TO PRESENT A MERITORIOUS DEFENSE AND WHETHER THAT DEFENSE WAS SUCH THAT IT WAS REASONABLY PROBABLE THAT A DIFFERENT, MORE FAVORABLE OUTCOME WOULD HAVE RESULTED.

THE CIRCUMSTANTIAL EVIDENCE THAT REFUTED THE MENTAL DEFENSE AT THE TRIAL, I JUST THINK, WAS CONSISTENT, AND BECAUSE OF IT'S CONSISTANCY, BECAME OVERWELMING. I THINK THE

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EVIDENCE OF THE PREPARATION THAT MR. DAWSON TOOK AT THE HOUSE, JUST TO MENTION A FEW THINGS, YOU KNOW, THE CONSCIOUS THOUGHT TO SMOKE OUTSIDE AS OPPOSED TO INSIDE THE HOUSE SO THAT HIS - - THE REASONABLE INFERENCE TO BE DRAWN FROM THAT, SO HE WOULDN'T BE IMMEDIATELY DETECTED.

AFTER THE SHOOTING, THE COMMENT TO JUDY KEARNS, "JUDY, I HOPE YOU UNDERSTAND I HAD TO DO IT." GOING IN TO GET A PILLOW FOR DONA BECAUSE JUDY SAID SHE NEED A PILLOW. POURING HIMSELF ANOTHER GLASS OF WINE. SAYING TO MR. BAKER, "YOU CAN'T TALK TO HER, BECAUSE I JUST KILLED HER. YOU BETTER CALL THE SHERIFF." THE COMMENT TO THE POLICE OFFICER AT THE SCENE HIS HANDCUFFS WERE TOO TIGHT; THEY WERE UNCOMFORTABLE; "COULD YOU LOOSEN MY HANDCUFFS?"

AGAIN, IMMEDIATELY AFTER THE KILLING, AT THE CRIME LAB WHEN THE BLOOD IS DRAWN, "YOU ARE GOING TO PUT THE TIME ON IT, AREN'T YOU?" TO THE TECHNICIAN.

I THINK ALL THOSE SMALL PIECES OF EVIDENCE PRESENTED PROBLEMS TO THE DEFENSE IN TERMS OF MENTAL DEFENSE. HE DIDN'T NEED ANOTHER PSYCHIATRIST TO SORT OF AGREE OR CONFIRM WITH THE CIRCUMSTANTIAL EVIDENCE. I DON'T THINK - - MR. BROWER'S DECISION, YOU CAN DIFFER WITH IT AT THIS POINT IN TIME, BUT I DON'T THINK IT WAS THAT OUT OF LINE WITH THE EVIDENCE. AND IT WAS A CONCLUSION A COMPETENT ATTORNEY REACHED.

ON SUFFICIENCY OF THE EVIDENCE, THAT'S JUST TOUCHED ON IN MOVING PAPERS. IT WASN'T ANYTHING THAT MR.

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BRUSTMAN OR MR. HAIGH ARGUED AT LENGTH. BUT IN TERMS OF THE SUFFICIENCY OF THE EVIDENCE, I THINK THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT A VERDICT BEYOND A REASONABLE DOUBT ON A FIRST DEGREE MURDER THEORY. I MEAN IF THE JURY HAD REACHED A DIFFERENT DECISION ON THE SPECIAL CIRCUMSTANCE ALLEGATION, I THINK MY OPINION WOULD HAVE BEEN THE SAME.

ON THE JURY INSTRUCTION QUESTION, THERE IS NO QUESTION THE LYING IN WAIT INSTRUCTION IS A DIFFICULT INSTRUCTION. BUT I THINK THAT'S CONSISTENT WITH THE STATE OF THE LAW IN THAT PARTICULAR AREA. I THINK LYING IN WAIT IS A DIFFICULT AREA FOR LAWYERS AND

JUDGES, AND IT'S EQUALLY DIFFICULT, IF NOT MORE DIFFICULT, FOR JURORS. I DON'T KNOW IN REVIEWING THAT INSTRUCTION WHETHER REVISING IT WOULD HAVE IMPROVED IT. I -- IN REVIEWING IT, I DIDN'T SEE A SIMPLE WAY TO IMPROVE IT, TO CLARIFY WHAT I CONSIDERED TO BE A DIFFICULT AND COMPLEX AREA OF THE LAW FOR THE JURORS, KNOWING IF IT WAS REVISED, IT WOULD HAVE TO BE CONSISTENT WITH THE LAW, SO CONSISTENT, IT WOULD BE CONSISTENTLY DIFFICULT, I BELIEVE.

SO BASED ON ALL OF THOSE REASONS, I BELIEVE THAT THE DEFENSE HAS FAILED TO MEET ITS BURDEN IN ESTABLISHING THAT THE DEFENDANT WAS DENIED A FAIR TRIAL ON ANY OF THE ISSUES PRESENTED: EFFECTIVE REPRESENTATION OF COUNSEL, THE JURY INSTRUCTION OR THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT.

SO THE MOTION FOR NEW TRIAL WOULD BE DENIED.

APPENDIX G

[Stamped:
FILED
AUG 11 2000
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS]

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * * * * * * * * * * * * * * * *

DONALD E. DAWSON, Petitioner-Appellant,	*	No. 96-56724
v.	*	D.C. No. CV-
JAMES GOMEZ, Warden;	*	94-00956-AHS
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	*	ORDER

* * * * * * * * * * * * * * * * * *

Before: **B. FLETCHER, KOZINSKI** and **THOMPSON,** Circuit Judges.

The petition for rehearing is denied. The full court has been advised of the petition for rehearing en banc and, no active judge having requested a vote thereon, the petition is denied. Fed. R. App. P. 35.